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in the

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1881

DARRELL AGRELLA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Date: May , 1980

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INTRODUCTION

DARRELL AGRELLA files this Petition for Writ of Certiorari seeking review of a final order of the Supreme Court of Florida, dated February 28, 1980 (not yet reported).

The order affirmed an opinion of the District Court of Appeal, Third District of Florida, which held that Petitioner could not complain of his inability to secure a fair trial without attempting to select a jury.

The case involves a severed co-defendant in a totally televised trial which received unprecedented publicity as a result of the "television intoxication" defense raised by the first tried defendant.

OPINIONS BELOW

The order of the Supreme Court of Florida, Appendix A, is not yet reported.

The opinion of the Florida District Court of Appeal, Third District, Appendix B, is reported at 372 So.2d 487 (Fla. 3d DCA 1979).

JURISDICTION

This Petition is timely filed from the final ruling of the Supreme Court of Florida, dated February 28, 1980.

No rehearing nor request for extension of time was sought.

Jurisdiction is deemed to exist under the provisions of Rule 19(a) of the Supreme Court Rules since a state court has decided a federal question of substance probably not in accord with applicable decisions of this court.

Jurisdiction is also sought under Title 28, Section 1257(3) U.S.C., since it is contended that rights, privileges and immunities under the United States Constitution were denied Petitioner.

QUESTION PRESENTED

DOES THE TELEVISING OF AN ENTIRE TRIAL OF A DEFENDANT CHARGED WITH FIRST DEGREE MURDER, WHO DEFENDS ON THE BASIS OF "TELEVISION INTOXICATION", DESTROY THE RIGHT OF A SEVERED CO-DEFENDANT TO A SUBSEQUENT FAIR TRIAL WHEN THE TELEVISED TRIAL IS SEEN BY MILLIONS OF VIEWERS.

CONSTITUTIONAL PROVISIONS

Amendment VI to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Amendment XIV to the Constitution of the United States provides in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . .

STATUTE INVOLVED

32 F.S.A. Judicial Conduct Canon 3A(7) (1978 Supp.) was revised by the Florida Supreme Court to permit electronic media coverage of courtroom proceedings. Canon 3A(7) in part had provided:

> (7) A judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto . . .

The Canon was revised to permit such coverage on an experimental basis at the time of this trial in *Petition of Post-Newsweek Stations, Fla., Inc.*, (Fla. 1976) modified 337 So.2d 804 (Fla. 1976), modified 347 So.2d 402 (Fla. 1977), modified 347 So.2d 404 (Fla. 1977).

STATEMENT OF THE CASE

Ronney Zamora and Darrell Agrella were indicted and charged with first degree murder. The announced intention of Zamora was to defend on the basis that television had intoxicated him to the point where he committed the murder. Agrella objected to the television coverage of the trial. Zamora did not. Agrella was severed for a subsequent trial. Agrella sought and

obtained a pre-trial gag rule prohibiting statements and interviews by and with Zamora's counsel. Zamora announced his intention to call actor Telly Savalas as an expert witness. He did not in fact appear. *Zamora v. State,* 361 So.2d 776 (3d DCA 1978).

Agrella moved for a discharge based on insurmountable prejudicial publicity destroying his right to a fair trial.

Agrella moved to dismiss the indictment upon the grounds that the grand jury was improperly constituted. The motion was granted, the grand jury was discharged, and the indictment was dismissed. Zamora did not join in the motion. Zamora was convicted of first degree murder.

A direct information was filed by the State Attorney's office charging Darrell Agrella with second degree murder, robbery and burglary. A plea agreement was reached wherein Agrella pled nolo contendere to the information charging him with murder in the second degree, robbery and burglary.

Agrella renewed his motion for discharge based upon the denial of the possibility of a fair trial as a result of the total televising of the Zamora trial and subsequent rebroadcasts of the same trial on May 23, 1978.

The motion was denied. An appeal resulted in affirmance, the District Court of Appeal holding that since no record was made of any prejudice from pre-trial publicity, reversal would be inappropriate.

RAISING THE FEDERAL QUESTION

The federal right to a fair trial free from television was raised from the outset of the proceedings. The indictment was returned on July 15, 1977. A motion to declare Florida's Experimental Rule 3A(7) unconstitutional as written and as applied was filed on September 9, 1977. On October 7, 1977, Petitioner filed his motion to discharge based on pre-trial publicity and the inability to secure a fair trial.

On April 5, 1978, at the time of entering the plea of nolo contendere, Petitioner again sought the dismissal of the charges based upon constitutional grounds thus preserving the point for appeal.

The same point was raised on appeal.

At the trial of the co-defendant, Ronney Zamora, Petitioner again sought the exclusion of television cameras from the trial based upon the contention that it would affect his subsequent trial.

REASON FOR GRANTING THE WRIT

It is respectfully submitted that this case is unique. No appellate opinion has been found by counsel where the objection to television coverage was made, not by a defendant on trial, but by a severed co-defendant yet to be tried.

In this case, on September 9, 1977, the trial court invoked its "gag rule" prior to the trial of Zamora in order to prevent pre-trial publicity from invading Petitioner's rights to a fair trial. Again, at the time of the trial of Zamora, Petitioner sought to prevent

television coverage since in effect the trial of Zamora would be pre-trial as to Agrella. The trial court refused to bar television and, thus, a self-conflicting situation was created where a gag rule in effect as to pre-trial publicity was negated by permitting television coverage of the trial of the first defendant.

In *Gannett Co. v. DePasquale,* 99 S.Ct. 2898 (1979), this court recognized the propriety of barring television when necessary from pre-trial hearings.

The trial of the Zamora case itself created the most widespread television coverage yet known in the United States.

The pervasive nature of the television coverage can best be determined from a review of the Report to the Supreme Court of Florida by the late Circuit Judge, Paul Baker, who presided at the Zamora trial and at the Agrella plea. A recapitulation of the pertinent parts of Judge Baker's report is attached hereto as Appendix D. In part, Judge Baker found:

> In addition to worldwide television coverage, the trial was reported extensively in almost every newspaper in the United States and abroad on a daily basis. There was also extensive coverage on radio, and the proceedings were published by news magazines in this and other countries. The articles that appeared in the printed media were, in most instances, accompanied by photographs taken in the courtroom during the course of the trial.

There were over 60 individual media personnel from local stations and each of the major networks, as well as foreign countries. One portable television camera was in the courtroom throughout the proceedings.

The worldwide coverage of the Zamora trial was probably viewed by several million people. "State of Florida v. Zamora" was listed in T.V. Guide and local newspapers as a regularly scheduled program on WPBT (Channel 2). This trial took place during the Nielsen rating period (A. C. Nielsen Co.) and the results showed that on a given evening more people viewed the Zamora trial than watched the Johnny Carson Show during the same time period on Channel 7.

The *Estes* trial was viewed, according to Mr. Justice Clark, by an estimated 100,000 people. See, *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), in which the conviction was reversed.

Millions of people in the State of Florida viewed the Zamora trial and an unknown number of people read about the trial. Throughout the Zamora record, references were made to Darrell Agrella's presence and participation in the case. The camera was not excluded when the jury was excluded. As a result, the public knows that which the court felt a jury should not know.

In the event that the case was set for trial in Florida, it is entirely conceivable that a jury could be selected with persons who did not consciously know or recall the name, Darrell Agrella. The impropriety of the situation, however, lies in the fact that at some point in the trial itself, sudden recall of the events which were

being testified to would reach the jury's conscious knowledge from that which, up to that point, had been a subconscious store of facts. This court is familiar with the term and meaning of "subliminal advertising" where it is contended that short flashes of information create conditioning which will affect one's actions at a future time. Although the jurors might not, at the time of selection, recall the name of Darrell Agrella, it is inconceivable that at some point in the trial unknown to the State, Court or Defendant, recognition of the factual situation would not suddenly come to the minds of the jurors.

In *Estes v. Texas, supra,* two days before the trial, a pre-trial hearing was put on television. Ruling on the prejudice of the television, this court stated:

> Pretrial publicity can create a major problem for the defendant in a criminal case. Indeed it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence.

Commenting on the prejudice associated with television, this court held:

> Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced.

Finally, commenting on the inherent prejudice associated with television coverage of a trial, this court stated:

> It is true that most cases involving claims of due process deprivations require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result, that it is deemed inherently lacking in due process.

In *Rex v. Fisher,* 2 Camp 563, 170 Eng. Rep. 1253 (KB 1811), Lord Ettenborough clearly stated the problem of extensive pre-trial publicity:

> If one thing is more important than another in the administration of justice it is that the jurymen should come to the trial of those persons on whose guilt or innocence they are to decide with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before ex parte statements of evidence against the accused, which the latter had no opportunity to disprove or to convert?

This case presents the same problems that would be presented were a new trial granted Zamora. It presents the same problems that would be presented in any case where a defendant is tried after the trial of his co-defendant has already been shown on television.

The American Bar Association Commentary under Section 3.4(b), Commentary of Specific Recommendations, p. 135, of the Standards of Fair Trial and Free Press states:

> It is not unthinkable that under such a standard, in a particularly notorious case in which substantial amounts of inflammatory or otherwise prejudicial material has been disseminated, an acceptable jury could not be empaneled. Perhaps this is not too great a price to pay to make the rights of all those subjected to the criminal process more secure.

Estes, supra, when read in toto, is remarkably similar. The point made by counsel here was also referred to in the majority opinion of Mr. Justice Clark at page 552 wherein it is stated:

> Finally, new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later be called upon to sit in the jury box during the new trial.

The events taking place in the case before this court represent the situation envisioned by Mr. Justice Clark. Here, viewers who have seen an original trial when telecast will be called upon to sit in the jury box during a new trial. The most disheartening problem represented in this case, however, is that the new trial takes place with the names of the characters changed but the alleged criminal incident remains the same.

The District Court of Appeal, Third District of Florida, in effect failed to consider the points raised by this Petition. It held that absent a showing in the record of facts demonstrating prejudice, reversal of the conviction could not be seriously considered. The Supreme Court of Florida did not change that position.

An analysis of the leading United States Supreme Court cases dealing with pre-trial publicity demonstrates that under certain circumstances prejudice due to pre-trial publicity will be assumed. The facts of this case do disclose extreme circumstances where Petitioner did not have the burden of showing actual prejudice.

In *Estes v. Texas, supra,* there were television cameras in the courtroom. Approximately 100,000 people saw the proceedings on television. The State argued in that case that the defendant failed to show actual prejudice. The United States Supreme Court responded:

> The State paints too broadly in this contention, *for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal.* This is such a case. It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. *Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.* (Emphasis added)

The same principle was stated in *Sheppard v. Maxwell,* 389 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966), when this court stated:

> Moreover, the burden of showing essential unfairness as a demonstrable reality, *Adams v. United States ex rel McCann, supra, need not be undertaken when television has exposed the community repeatedly and in depth to the spectacle of the accused personally confessing in detail to the crimes with which the latter was charged. Rideau v. Louisiana,* 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963). (Emphasis added)

In *Rideau v. Louisiana,* 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963), the defendant was interviewed in jail by a local television station. The confession was televised on the news that night and the following day. The court estimated that approximately 35,000 people in the community viewed the interview. Commenting on the prejudice to the defendant, the court stated:

> For anyone who has ever watched television the conclusion cannot be avoided that the spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial — at which he pled guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

Realizing that in certain extreme circumstances, the prejudice is so obvious that the defendant has no burden to actually show prejudice, the court held:

> But we do not hesitate to *hold without pausing to examine a particularized transcript of voir dire examination that due process* of the law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised interview. (Emphasis added)

It is Petitioner's contention that in a case where pervasive publicity took place to the extent reflected by this record, no token attempt is necessary to show the prejudice created by the mass of television coverage.

The Florida courts avoided consideration of the constitutional problem present here in improperly holding for the necessity of proving prejudice.

No appellate court has addressed the problem of a severed defendant immersed in television coverage of a co-defendant tried first.

CONCLUSION

This court has noted probable jurisdiction in *Chandler and Granger v. Florida,* No. 79-1260, October Term, 1979.

This case represents a substantial element of the trial by television problem not involved in *Chandler, supra.*

The Florida experiment has become a nationwide problem. The Florida courts have ignored the rights of those defendants indirectly but seriously affected by trial television.

The nature of the defense in *Zamora, supra,* magnified the dilemma for his co-defendant but it also illuminated the issue of the right of a defendant to a non-televised trial, if necessary, to protect his right to a fair trial.

We respectfully urge the notation of probable jurisdiction.

Respectfully submitted,

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By: /s/ Milton E. Grusmark
MILTON E. GRUSMARK
ROBERT KALTER

APPENDIX

APPENDIX A

Supreme Court of Florida

THURSDAY, FEBRUARY 28, 1980

CASE NO. 57,400

District Court of Appeal, Third District
#78-1266

DARRELL M. AGRELLA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. Edward D. Cowart,
Chief Judge
Hon. Richard P. Brinker, Clerk

•

Milton E. Grusmark, Esquire
Calvin L. Fox, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ KAY D. YERT
Deputy Clerk

APPENDIX B

Darrell M. AGRELLA,

Appellant,

v.

The STATE of Florida,

Appellee.

No. 78-1266.

District Court of Appeal of Florida,
Third District.

May 22, 1979.

Rehearing Denied July 2, 1979.

Milton E. Grusmark, Miami, for appellant.

Jim Smith, Atty. Gen. and Calvin L. Fox, Asst. Atty. Gen., for appellee.

Before HAVERFIELD, C. J., and PEARSON and SCHWARTZ, JJ.

PER CURIAM.

Darrell M. Agrella pled nolo contendere to an information charging him with murder in the second degree, robbery and burglary. He reserved his right to

appeal "based upon each motion that had been filed.[1]" The issues raised are (1) whether the trial court erred in denying the defendant's motion for discharge because of pretrial publicity and (2) whether the defendant's right to a speedy trial was violated even though he waived a speedy trial in order to minimize pretrial publicity.

Agrella was informed against for crimes growing out of the same criminal transactions for which Ronny A. Zamora was separately tried. Zamora's subsequent appeal to this court is reported at 361 So.2d 776 (Fla. 3d DCA 1978). Zamora's trial, which began in late September of 1977, was televised pursuant to Experimental Canon 3A(7), code of Judicial Conduct of the State of Florida. Agrella filed his motion for discharge on October 7, 1977. He alleged that the pretrial publicity in his case resulting from Zamora's televised trial, with the broadcast and rebroadcast of that trial, created conditions under which he (Agrella) could not receive a fair trial. He relies on this argument alone. He presumes that it was the duty of the trial court to take judicial notice of the prejudice he claims was created in the community, state and nation against him by the widespread broadcast of the Zamora trial. There was no attempt at jury selection; there was no trial. Other than our presumed duty to believe that there was prejudice, there is no evidence in the record for this court to consider.

[1-4] A claimed constitutional right to a television-free trial has already been rejected by this

[1]While we cannot approve a reservation other than one that is specific and based on a question of law, nevertheless, for the purpose of this appeal, we accept the reservation as the trial court did. But see *Hand v. State*, 334 So.2d 601 (Fla.1976).

court. See *Chandler v. State,* 366 So.2d 64 (Fla. 3d DCA 1978). An appellant who alleges error in the trial court must show such error in the record. See *Marks v. Insurance Service Bureau, Inc.,* 262 So.2d 450 (Fla. 3d DCA 1972); see also *Bryant v. State,* 204 So.2d 9 (Fla. 3d DCA 1967). It follows that a point claiming that an accused should have been discharged because of pretrial publicity in another case carries with it the burden of presenting facts to the trial court raising the issue. There being no facts in this record, we cannot find error. Cf. *Abbott v. State,* 334 So.2d 642 (Fla. 3d DCA 1976); and *Murphy v. State,* 252 So.2d 385 (Fla. 3d DCA 1971).

Affirmed.

APPENDIX C

IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 77-25123 B

THE STATE OF FLORIDA,

Plaintiff,

vs.

DARRELL AGRELLA,

Defendant.

MOTION TO DECLARE FLORIDA'S
EXPERIMENTAL RULE 3A(7)
UNCONSTITUTIONAL,
AS WRITTEN AND AS APPLIED

COMES NOW the Defendant, DARRELL AGRELLA, by his undersigned attorney, and respectfully moves this Honorable Court for the entry of an Order declaring Florida's Experimental Rule 3A(7) unconstitutional as written and as applied and, as grounds therefor, states:

I

On or about June 17, 1977, the Florida Supreme Court entered its Order Modifying Canons of Judicial Ethics 3A(7), found in 32 F.S.A. Pocket Part, and Rule 3.110, for the one year period beginning July 5, 1977, through June 30, 1978, to permit the presence during pre-trial and trial proceedings of television cameras and still photographers for broadcast purposes, either by tape or simultaneous replay; said Experimental Rule also permits the Presiding Judge to allow other members of the media to broadcast live the proceedings.

II

The Defendant feels that if this Court permits live broadcast of his trial, he will not be able to receive a fair and impartial trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, nor would he receive due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, nor would he receive due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. In addition, the Defendant feels that the presence of television cameras will have a harmful and prejudicial effect on prospective witnesses, jurors, his attorney, and possibly even the learned trial judge.

III

The Defendant's case has received a substantial amount of publicity thus far due to the Defendant's age and the nature of the defense employed by counsel for co-defendant.

IV

As the U.S. Supreme Court said in *Estes v. Texas*, 381 U.S. 532 (1965), the presence of television cameras is legaily irrelevant to the fact-finding process and will substantially harm and impair the Defendant's right to a fair and impartial trial free from the possibility of taint; in essence, the United States Supreme Court went on to assert that the presence of television cameras in the courtroom during Defendant's trial will clearly deny the Defendant due process of law.

V

In promulgating Experimental Rule 3A(7) and Rule 3.110, Florida Rules of Criminal Procedure, the Florida Supreme Court neglected to take into consideration a defendant's rights and was concerned, apparently, solely with the rights of the media. As Justice Hugo Black asserted 36 years ago, in a clash between the First and the Sixth Amendments, the First must yield to a defendant's right to a fair and impartial trial free from the possibility of taint and prejudice.

VI

On July 27, 1977, the Honorable Alan R. Schwartz, sitting in the same judicial circuit as this Honorable Court, in response to a similar motion filed by Joel Hirschhorn, Esq. in Case No. 77-5070, certified the question of law raised by this motion to the Florida Supreme Court pursuant to Rule 4.6 of the Florida Appellate Rules.

WHEREFORE, it is respectfully prayed that this Court enter its Order declaring the Experimental Rule unconstitutional as written and as applied, or, in the alternative, an Order prohibiting the presence of live cameras and still photographers during all proceedings herein, or, any other appropriate Order this Court may deem proper.

Respectfully submitted,

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Attorneys for Agrella
3628 NE Second Avenue
Miami, FL 33137 (576-6590)

BY /s/_____
MILTON E. GRUSMARK

I HEREBY CERTIFY that a true copy of the foregoing was this 19 day of September, 1977, forwarded to the Office of the State Attorney, 1351 NW 12 Street, Miami, FL 33125 and to Ellis Rubin, 265 NE 26 Terrace, Miami, FL 33137.

BY /s/_____
MILTON E. GRUSMARK

APPENDIX D

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

(CRIMINAL DIVISION)

Paul Baker, Judge

Case No. 77-25123-A

STATE OF FLORIDA,

Plaintiff,

vs.

DARRELL AGRELLA,

Defendant.

REPORT TO
THE SUPREME COURT OF FLORIDA

re:

Conduct of

AUDIO-VISUAL TRIAL CONFERENCE

* * *

In addition to worldwide television coverage, the trial was reported extensively in almost every newspaper in the United States and abroad on a daily basis. There was also extensive coverage on radio and the proceedings were published by news magazines in this and other countries. The articles that appeared in the printed media were, in most instances, accompanied by photographs taken in the courtroom during the course of the trial.

* * *

(a) One portable television camera was in the courtroom throughout the proceedings. This camera was operated by WPBT (Public Broadcasting Service) Channel 2, Miami. On no occasion was more than one camera person operating the equipment during the course of the trial.

* * *

(d) "Pooling" arrangements among the media were made well in advance of the trial; however, because there were over 60 individual media personnel from local stations and each of the major networks as well as foreign countries, it was necessary in the Court's opinion to appoint a liaison person to act as a coordinator. The network television personnel from out of state and the foreign media personnel were not familiar with the order of the Florida Supreme Court and it was necessary to hold a briefing session in order to familiarize everyone with the procedures to be followed. This briefing was handled by Mr. Steve Tello, News Operations Manager of WPLG TV, Channel 10, whom the Court had appointed as liaison. Any matters that required

clarification were communicated to the Court through Mr. Tello and in turn he conveyed instructions to the media from the Court.

* * *

9. Evaluation of program.

The issue sought to be resolved in this pilot program is whether or not access to the courts through the medium of electronic media is compatible with the orderly administration of justice.

As Mr. Justice Black observed in *Bridges v. California,* 314 U.S., at 260, 86 L.Ed. 192, 62 S.Ct. 190, 159 ALR 1346:

> ". . . free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

The question arises whether or not unfettered access to news becomes synonymous with unfettered dissemination. If the answer to this question is in the negative, the next query is where does the authority lie to decide what will be reported and what will not.

It would appear the answer to these questions lies equally between the inherent powers of the Court and the conscience of the media.

As an example, it would be unthinkable for a child of tender years who had been the victim of a rape to be

repeatedly photographed on television or in the printed media and suffer the ridicule of her classmates and friends and equally unthinkable for a trial judge to permit it. The same would apply to the victim of any sexual assault or any case involving a child.

Likewise, it would be prejudicial to the orderly administration of justice to permit the photographing of a police undercover agent or confidential informant when such action could pose a threat to the individual's life or, in the alternative, impede the efforts of law enforcement. Rather than face these issues in a confrontation between the press and the courts, the better practice would appear the media itself establish an enforceable code of ethical conduct to be adhered to by all members of their profession not inconsistent with the code of conduct imposed upon judges and lawyers.

This is not to suggest that trial judges should abdicate their authority and allow the press free rein in determining what will be reported or disseminated nor, on the other hand, should judges shed their robes and assume the role of editor, director or producer. It has been shown that in either instance abuses have resulted.

Certainly the most flagrant abuse was the trial of Bruno Hauptman[1] in 1934. However, Chief Justice Warren Burger points out in *Nebraska Press Association v. Stuart*, 96 S.Ct. 2791 (1976) at 2798:

> "Criticism was directed at the 'carnival' atmosphere that pervaded the community and

[1] *Hauptman v. New Jersey*, 115 N.J.Law 412, 180 A 809, Cert. denied 296 U.S. 649, 56 S.Ct. 310 (1935).

the courtroom itself. Responsible leaders of press and the legal profession — including other judges — pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court."

More recently in the celebrated case of *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966), Mr. Justice Clark cited several examples of actions that were not taken by the trial judge which amplified the prejudice arising from the publicity surrounding Dr. Sheppard's trial.

Justice Clark noted, inter alia, that the Sheppard jury was not sequestered thus exposing them to newspaper, radio, and television coverage. The jurors were permitted to go their separate ways outside the courtroom without adequate directions from the trial judge not to read or listen to anything concerning the case. It was noted that the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. Justice Clark further noted that the numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinions from both cranks and friends. Prospective jurors also received anonymous letters that should have made the trial judge aware that the publicity seriously threatened the jurors' privacy.

Justice Clark agreed with the opinion of the Ohio Supreme Court that Dr. Sheppard's trial was conducted in the atmosphere of a "Roman Holiday", 165 Ohio St., at 294, 135 N.E. 2d at 342.

This Court was fully aware of the opinion in *Sheppard v. Maxwell* and took the necessary steps to avoid the problems that arose in that case. The jury was sequestered in a hotel where arrangements had been previously made to either remove or disconnect the television sets in the rooms occupied by the jurors.

The jurors were kept together during the course of the trial under the supervision of a bailiff and security personnel from the Public Safety Department. They were not permitted newspapers, magazines or radios. The jury was transported together from the courthouse to the hotel and from the hotel to the courthouse. At all times they were in the company of the bailiff and security personnel. The jurors dined together and precautions were taken to insure they did not discuss testimony or any facet of the case throughout the trial. A request from the jury made during the trial to view themselves on television with the sound turned off was denied by the Court.

Through the media liaison person, the Court instructed that no photographs of the jury be taken either entering or leaving the courthouse.

This admonition became necessary when some members of the foreign media attempted to photograph jurors and witnesses in the corridors leading to the courtroom.

* * *

The Courts primary concern throughout this experiment should be to avoid even the "probability

that prejudice will result" and that the conduct of a trial with electronic media in the courtroom will not be "deemed inherently lacking in due process". See *Estes v. State of Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed. 2d, 543 (1965).

In reversing the conviction of Estes, the Supreme Court of the United States pointed out that there was an absence of any showing of prejudice. In Estes as well as Sheppard it was the trial judge's failure to give adequate instructions and admonitions as well as his failure to insulate the jury from reporters and photographers that caused the Court concern.

This concern amplified by Mr. Justice Black's comment in *In Re: Murchison,* 349 U.S.133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955) when he observed:

> ". . . our system of law has always endeavored to prevent even the *probability* of unfairness." (Emphasis supplied)

The overwhelming obstacle to this pilot program lies in the United States Supreme Court's decision in Estes. It should be noted that the Estes opinion was authored by Mr. Justice Clark speaking for the majority. He was joined by his brothers, Douglas, Goldberg, Harlan and Mr. Chief Justice Warren. Of these five only the Chief Justice, together with Justice Clark, Douglas and Goldberg, were of the view that the televising of trials as well as taking still pictures in the courtroom was in and of itself prejudicial error requiring reversal.

Mr. Justice Harlan did not go that far. Although concurring in the majority opinion, Justice Harlan was careful to point out that the use of cameras in the courtroom should be judged under the circumstances surrounding Estes only.

In his concurring opinion he took great pains to point out:

> ". . . the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause."

Bearing in mind that Estes was decided June 7, 1965 (the trial having taken place in 1962), it is appropriate that we reevaluate the issue in the light of Justice Harlan's comments.

All of the Justices who concurred in the majority opinion of Estes have left the High Court. Of the four who dissented, three remain.

* * *

Mr. Justice Clark points out, that television is particularly bad where the judge is elected and notes that such is the case in all but six states. He noted that it would be difficult for judges to remain oblivious to the pressures that the news media can bring both directly and through the shaping of public opinion.

This Court, with the deepest respect for Mr. Justice Clark, disagrees.

* * *

The greater concern of an attorney sacrificing the interests of his client on the altar of counsel's personal ego is far more disturbing. But, here again, if such were the case, appropriate safeguards have been built into the law for post-conviction relief. (See Florida Criminal Rule of Procedure 3.850.) In addition, such conduct on the part of an attorney would be so deplorable as to merit disciplinary proceedings by the bar and the Supreme Court.

* * *

It is interesting to note that the Estes trial was viewed by an estimated 100,000 people according to Justice Clark; the worldwide coverage of the Zamora trial was probably viewed by several million.[1]

* * *

Finally, it is emphatically urged that strong disciplinary action be taken against any attorney or judge who solicits media coverage of a trial for personal or political motives.

* * *

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[1]*State of Florida v. Zamora* was listed in T.V. Guide and local newspapers as a regularly scheduled program on WPBT (Channel 2). This trial took place furing the Nielsen rating period (A.C. Nielsen Co.) and the results showed on a given evening the Zamora trial was viewed by more people than watched the Jchnny Carson show during the same time period on WCKT (Channel 7) the NBC affiliate.

CASE NO. 79-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DARRELL M. AGRELLA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE DEFENDANT, DARRELL AGRELLA, HAS PROPERLY PRESERVED ANY SUBSTANTIAL FEDERAL QUESTION WARRANTING THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

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PREFACE

The Petitioner, Darrell Agrella, was the defendant in the Florida trial court below. The State of Florida was the prosecution below. In this brief, the parties will be refered to as they appeared in the trial court below.

The following references are made in this brief:

(A) For the Appendix to the brief of the Petitioner consisting of pages A1-A18.

I.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, affirming the conviction of the Defendant, Darrell Agrella, is reported at Agrella v. State, 372 So.2d 487 (Fla. 3d DCA 1979). See, also, A3-A5. The opinion of the Suprme Court of Florida, denying certiorari is reported at Agrella v. State, 383 So.2d 1189 (Fla. 1980). See, also, A1-A2. There are no official reports for citation of these decisions.

II.

JURISDICTION

The Defendant, Darrell Agrella, claims jurisdiction herein based upon 28 U.S.C. 1257(3).

IN THE

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CASE NO. 79-1881

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THE STATE OF FLORIDA,

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ON PETITION FOR WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

III.

STATEMENT OF THE CASE

The Defendant, Darrell Agrella was charged by information in the Florida trial court below with second degree murder, robbery and burglary. 372 So.2d 488 (See, A3-A4). The Defendant's co defendant was

Ronny A. Zamora, whose trial and conviction are reported at, Zamora v. State, 361 So. 2d 776 (Fla. 3d DCA 1978). Id. There was no trial or even an attempt at voir dire in the case at bar. Id.

Relative to the Petition for Certiorari herein, the Defendant, Agrella, sought an absolute discharge from criminal responsibility in the Florida trial courts, based upon a summary argument that he could not receive a fair trial because of the televised trial of the Codefendant, Ronny A. Zamora. Id. The precise issue presented for review in the Florida Courts was succinctly noted by the Florida District Court, thus:

> "The issues raised are (1) whether the trial court erred in denying the defendant's motion for discharge because of pretrial publicity and (2) whether the defendant's right to a speedy trial was violated even though he waived a speedy trial in order to minimize pretrial publicity."
>
> Id.

In rejecting the Defendant's complaint of error arising from bare allegations of prejudicial pretrial publicity, the Florida District Court succinctly explained that:

> "Agrella filed his motion for discharge on October 7, 1977. He alleged that the pretrial publicity in his case resulting from Zamora's televised trial, with the broadcast and rebroadcast of that trial, created conditions under which he (Agrella) could not receive a fair trial. He relies on this argument alone. He presumes that it was the duty of the trial court to take judicial notice of the prejudice he claims was created in the community, state and nation against him by the widespread broadcast of the Zamora trial. There was no attempt at jury selection; there was no trial. Other than our presumed duty to believe that there was prejudice, there is no evidence in the record for this court to consider.
>
> "A claimed constitutional right to a television-free trial has already been rejected by this court. See Chandler v. State, 366 So.2d 64 (Fla. 3d DCA 1978). An appellant who alleges error in the trial court must show such error in the record. See Marks v. Insurance Service Bureau, Inc., 262 So.2d 450 (Fla. 3d DCA 1972); see also Bryant

> v. State, 204 So.2d 9 (Fla. 3d DCA 1967). It follows that a point claiming that an accused should have been discharged because of pretrial publicity in another case carries with it the burden of presenting facts to the trial court raising the issue. There being no facts in this record, we cannot find error. Cf. Abbott v. State, 334 So.2d 642 (Fla. 3d DCA 1976); and Murphy v. State, 252 So.2d 385 (Fla. 3d DCA 1971).
>
> Affirmed." [Emphasis added].
>
> 372 So.2d at 488.

The State would also note that the Defendant also made no effort whatsoever to seek a change of venue.

On February 28, 1980, the Florida Supreme Court refused to entertain the Defendant's Petition for Certiorari upon the grounds that it was without jurisdiction under Rule 9.120 Florida Rules of Appellate Procedure. See, A1-A2 (383 So.2d 1189). On May 28, 1980, the Defendant filed his Petition for Certiorari to the Supreme Court of Florida.

IV

ARGUMENT

The issue of the constitutionality of Florida Judicial Canon 3A(7) permitting cameras and other electronic media in Florida Courtrooms as reported at, Petition of Post-Newsweek Stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), was never properly presented or preserved in the Florida Courts. See, A1-A5. It is well settled that complaints of error grounded upon prejudicial pretrial publicity and allegations of the lack of an impartial jury, must be grounded upon factual findings in the record. See, Murphy v. Florida, 421 U.S. 794 (1975); United States v. Haldeman, 559 F.2d 31, 59-71 (D.C. Cir. 1976), cert.den. 431 U.S. 933 (1977). Bare allegations of error concerning the knowledge of the veniremen of the pretrial publicity surrounding a case, are insufficient to warrant reversal.

Murphy v. Florida, 421 U.S. at 800-801; United States v. Haldeman, supra, at 60; Murphy v. State, 252 So.2d 385, at 387 (Fla. 3d DCA 1971). The burden is upon the appellant to show actual prejudice. Murphy v. Florida; Murphy v. State. Absent findings of fact and at least a record of voir dire, there is nothing which could be presented before this Court to warrant the exercise of jurisdiction. Certainly, the Petitioner has no standing to assert the rights of the codefendant, Ronny Zamora, as he attempts to do here. County Court of Ulster County, New York v. Allen, ___U.S. ___, 99 S.Ct. 2213, at 2223 (1979).

In the decisions relied upon by the Petitioner for conflict herein, the appellate court was presented with a record showing at least voir dire and a full jury trial. See, Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); see also, Irvin v. Dowd, 366 U.S.

717 (1961). Thus, in Sheppard v. Maxwell, the Court emphasized the trial court's failure to take measures to insulate the jury from massive publicity during the trial and the lack of that, "judicial serenity and calm to which [Sheppard] was entitled." 384 U.S., supra, at 355; see, also, Murphy v. Florida. In Irvin v. Dowd, the court did not simply review the pre-trial publicity and conclude that prejudice resulted. Rather, the court,"independently evaluate[d] the voir dire testimony of the impaneled jurors," [emphasis added]. See, 366 U.S. at 723. Even in Estes v. Texas, the court had the factual setting of the defendant's trial to weigh, in determining that the defendant had been deprived of due process by the televising and broadcast of his trial. 381 U.S. at 535.

The Defendant by his Motion for Discharge upon which his petition is predicated, sought to have the substance

of the charges against him entirely dismissed, rather than seeking a change of venue. The Defendant argues that no where in Florida, and even nowhere on this country, could the Defendant have received a fair trial because of pretrial pubicity. Even the most extreme of the pretrial publicity cases do not contemplate such an absurd result. See, Rideau v. Louisiana, 373 U.S. 723, (1963); Sheppard v. Maxwell; Irvin v. Dowd, supra. Even in the most extreme circumstance of pretrial publicity, the proper remedy is only a change of venue, and not outright dismissal. See, Rideau v. Louisiana.

Sub judice, the Defendant's assertion of jurisdiction is based upon bare speculation. In Haldeman, in observing the policy in Irvin v. Dowd, the Court also stated the controlling principle herein, to wit:

> "Irvin establishes 'a common-sense standard' of juror qualification. United States v. Caldwell, 178

> U.S. App. D.C. 20,33, 543 F.2d 1333, 1346 (1974), cert denied, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976). In keeping with that approach, a defendant who claims he was denied a fair trial because the jury was not sufficiently 'indifferent' generally must sustain that claim "not as a matter of speculation but as a demonstrable reality." United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S.Ct. 965, 970, 100 L.Ed. 1331 (1956), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268 (1942). This demonstration can be made only by reference to the voir dire." [emphasis added, footnote omitted].
>
> 559 F.2d, supra, at 60.

It is wholly apparent, upon the face of the record, that the conviction herein rests upon non-federal grounds; that the Defendant has failed to properly preserve the federal question of which he complains and that the question of the failure of the Defendant to render an adequate record is manifestly not a substantial federal question. The cause herein should therefore, be dismissed,

certiorari denied and/or the judgment below should be affirmed, inasmuch as the question presented by the Defendant is "so unsubstantial as to not need further argument." Durley v. Mayo, 351 U.S. 2, (1956); Rice v. Sioux City Cemetery, 349 U.S. 70 (1955); Lynch v. New York, 293 U.S. 52 (1934).

V.

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order deny certiorari affirming the judgment below and/or dismissing the Defendant's petition.

RESPECTFULLY SUBMITTED, on this ___ day of August, 1980, at Miami, Dade County, Florida.

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